Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

82-31
No.

IN THE

Supreme Court of the United States

October Term, 1982

HORMOZ SABET,

Petitioner,

- against -

AMERICAN EXPRESS INTERNATIONAL BANKING CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 6, 1982

(12521)

QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(1977), require the District Court to review the record of an evidentiary hearing held before a United States Magistrate upon appeal to the District Court from the Magistrate's Report and Recommendation or, in the absence of any record, to rehear the testimony?

2. Does a District Court have jurisdiction over an action by a New York bank against an Iranian guarantor of a loan to an expropriated Iranian corporation when the United States and Iran have entered into a treaty which provides:

> "An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . . ."?

3. Do settled statutory and common law precepts (a) mandate the discharge of co-obligors and guarantors where the outstanding obligation has been satisfied, and (b) compel the discharge of obligors where collateral has been impaired or retained?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HORMOZ SABET,

Petitioner,

-against-

AMERICAN EXPRESS INTERNATIONAL BANKING CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner Hormoz Sabet respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the summary judgment entered against petitioner by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinions of the Court of Appeals are not reported and are set forth in Appendix A, infra at A-1 , et seq. The Statement on Remand from the Court of Appeals, the opinions of the District Court, and the Report and Recommendation of the United States Magistrate are set forth in Appendix B, infra at B-5 , et seq.

PARTIES

The plaintiff in the courts below was American Express International Banking Corp. ("AMEX"), a New York banking corporation and a subsidiary of American Express Company. Defendant Hormoz Sabet is an Iranian citizen.

JURISDICTION

While the courts below initially had jurisdiction on the basis of diversity of jurisdiction, it is respectfully submitted that they were divested of jurisdiction by virtue of the Iran-United States Agreements and this Court's decision in Dames & Moore v. Regan, 453 U.S. ___, 101 S.Ct. 2972 (1981).

STATEMENT OF THE CASE

A. The Loan Transcations and the Pledged Shares

In 1977 and 1978, AMEX made four loans totalling $4 million to Habib Sabet for use by Firooz Corporation ("Firooz"), an Iranian company controlled by the Sabet family, but expropriated by the Iranian government during the hostage crisis. Hormoz Sabet cosigned and guaranteed the loans. The loans were collateralized by 150,000 shares of stock in the Industrial and Mining Development Bank of Iran ("IMD Bank"). Firooz and another Sabet family corporation, Iramoz Corporation ("Iramoz"), executed Pledge Agreements and posted the collateral on behalf of the Sabets. Payments of principal and interest and the repayment of one entire loan were made until Iranian exchange controls made it impossible to obtain

the currency needed to repay AMEX, thereby leaving a balance of $3,232,930 owed to AMEX.

B. The Political Crisis in Iran and the Sabets' Instructions to Sell the Pledged Shares

In December 1978, and thereafter from January 1979 through April 1979, the Sabets urged AMEX to sell the pledged shares in order to satisfy the outstanding obligations and to guard against the diminution in the value of the collateral, in view of the political and economical turmoil in Iran which culminated in the taking of the American hostages. AMEX did nothing. Had AMEX sold the collateral in January 1979, it would have realized $3,462,857, a sum more than sufficient to satisfy all outstanding obligations to AMEX.

After the new regime came to power in early 1979, it confiscated and na-

tionalized the Sabets' assets including Firooz and Iramoz. In June 1979, the Teheran Stock Exchange finally closed and with it, the market for IMD Bank shares. Hence, from December 1978 through June 1979, AMEX did nothing to protect the value of the collateral. No court has ever required AMEX to explain this failure or even to account for the whereabouts of the shares.

C. Prior Proceedings

In July 1979, AMEX commenced an action in New York State Supreme Court against Habib Sabet, Iradj Sabet, Hormoz Sabet and Firooz Corporation, wherein AMEX moved for summary judgment in lieu of complaint. The action was removed by defendants to the United States District Court for the Southern District of New York.

Hormoz Sabet defended against AMEX's motion on the grounds that he was never properly served with process and that, pursuant to protections afforded by the Uniform Commercial Code, AMEX's treatment of the collateral constituted (a) a foreclosure on the collateral, or (b) an impairment of the value of collateral, either action releasing Hormoz Sabet from liability.

On August 29, 1980, the District Court granted summary judgment against the defendants on the grounds that the defenses of the Uniform Commercial Code regarding AMEX's retention or impairment of the collateral were not available to non-owner obligors. (B 27 - 60).

The District Court, however, noted that a dispute existed as to whether Hormoz Sabet had been personally served and referred the matter to a United States Magistrate for an evidentiary

hearing.

On October 8 and 31, 1980, the Magistrate conducted hearings on AMEX's claim of personal service. AMEX's process server was shown to be "unclear", "imprecise" and inconsistent, in the words of the Magistrate. Further, contradicting AMEX's process server, Sabet and his attorney testified that Sabet was not even at the location where the process server claimed to have served him. The Magistrate nonetheless held that Sabet had failed to disprove the process server's claims and hence that process was validly served. On February 10, 1981, the Magistrate issued a Report and Recommendation containing fundamental errors of fact and contradictory conclusions. (R 5- 16).

On February 20, 1981, pursuant to 28 U.S.C. § 636(b)(1), Hormoz Sabet objected to the Magistrate's report and

requested the District Court to make the statutorily required "de novo determination", i.e., to review the record or, if there is no record, to rehear the brief testimony.

On April 6, 1981, without having reviewed any record of the proceedings before the Magistrate (since the testimony was not stenographically recorded), and without having listened to a tape recording of the proceedings, the District Court summarily affirmed the Magistrate's report. Thus, the District Court failed to make the appropriate "de novo determination".

In so doing, the District Court overlooked the serious error made by the Magistrate in assessing the testimony, namely that Hormoz Sabet testified that he was at his attorney's offices at the time of the alleged service and that "[his attorney] confirmed this", as well

as the fact that Sabet could not have departed unnoticed from his attorney's offices. This testimony was reiterated by Sabet's attorney in an affidavit submitted on February 25, 1981. The District Court then compounded the Magistrate's error when it erroneously assumed that Sabet's attorney "did not attempt to present this testimony at the hearing where he would have been subject to cross-examination and where his demeanor could have been observed and his credibility assessed . . . ." As Sabet's attorney stated in his affidavit, he did in fact appear and testify on direct and cross to precisely these facts at the hearing.

The court went on to note that "[Sabet's attorney] does not indicate at what time during the 'afternoon in question' Sabet arrived at [his attorney's offices] or specify that [he] saw

or spoke to Sabet at or around 2:55 . . . ." The District Court's findings are flatly repudiated by both (a) the Magistrate's Report which explicitly states that Sabet's attorney's testimony confirmed the fact that Sabet was at his attorneys at 2:55 P.M. on the day in question, and (b) Sabet's attorney's affidavit in which he affirms that Sabet was in an adjacent conference room during the brief periods that they were apart and that Sabet could not have left the offices without his attorney having noticed, as well as the fact that he had so testified at the hearing.

On April 15, 1981, the District Court entered judgment against Hormoz Sabet. An appeal to the United States Court of Appeals for the Second Circuit was thereafter taken.

On Decmeber 10, 1981, at the commencement of oral argument before the United States Court of Appeals for the Second Circuit, the Court observed that, with respect to the issue of the validity of service and the requirements of a "de novo determination", it wished to know whether the District Court had listened to a tape recording of the proceedings before the Magistrate. Accordingly, the Court adjourned all argument and remanded the case to determine whether or not the District Court had listened to the tape.

On December 23, 1981, the District Court filed its Statement of Remand, acknowledging that it had not listened to the tape recording of the proceedings before the Magistrate. The Court stated that, while it was the Magistrate's custom to retain the tape for 10 to 20 days after the Report is issued, since

AMEX's objections to the Report did not contain a specific request that the court listen to the tape, she erased the tape before the District Court began its review of AMEX's objections. Thus the possibility of an actual review of the proceedings before the Magistrate was eliminated. The District Court acknowledged that Sabet requested it to make a "de novo determination", but stated that Sabet never suggested that it should listen to the tape.

On April 5, 1982, the Second Circuit summarily affirmed the decision of the District Court noting that they had examined the District Court's "statement" pursuant to their remand and that it had considered oral argument when in fact no oral argument was ever had by the parties as to any issue.

D. The Iran-United States Agreements

The five agreements which were signed on January 19, 1981, thereby concluding the Iranian crisis ("Iran-United States Agreements"), were transmitted to Congress on March 12, 1981, and were upheld by this Court in Dames & Moore v. Regan, 453 U.S. ___, 101 S. Ct. 2972 (1981). This Court specifically upheld the Iran-United States Agreements insofar as they (a) "terminate[d] all legal proceedings in United States courts involving claims of United States . . . institutions against Iran . . . ." and (b) established the International Arbitral Tribunal (the Iran-United States Claims Tribunal) as the exclusive forum to resolve all claims by a U.S. institution and any Iranian entity or national.

In addition, one of the agreements established two funds (Dollar Account

No. 1 and Dollar Account No. 2), against which banking institutions could make claims for unpaid loans as follows:

DOLLAR ACCOUNT NO. 1

Dollar Account No. 1 (as it was subsequently called) was used to pay principal and interest on all loans made by banking syndicates of which U.S. banks were members. All such syndicated bank loans have been fully paid and satisfied. The balance of Dollar Account No. 1 is available to satisfy non-bank claims in the arbitral tribunal in The Hague, Netherlands. Iran has agreed to replenish this fund under certain circumstances.

DOLLAR ACCOUNT NO. 2

Other funds totalling $1,418 billion were transferred to, and are now retained by, the Bank of England

> "for the purposes of paying the unpaid principal and the interest owing, if any . . . on all other indebtedness held by United States banking institutions of, or guaranteed by the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid . . . ."

These funds are known as "Dollar Account No. 2".

Dollar Account No. 2 is available for claims of United States banks only. The balance of the fund must be returned to Iran. As of March 1982, accrued interest on Dollar Account No. 2 exceeded $300 million. Dollar Account No. 2 thus consists of more than $1,718 billion.

Approximately 40 United States banks (which were not participants in syndicated loans) including AMEX filed claims against Dollar Account No. 2. Their claims totalled approximately $700 million. It is thus obvious that ample

funds exist to pay all claims by all American banks concerned and that in any event, there is little doubt that AMEX's claim against Firooz is completely compensable by Dollar Account No. 2.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS ERRED IN SUMMARILY AFFIRMING THE JUDGMENT OF THE DISTRICT COURT, BECAUSE THE DISTRICT COURT DID NOT COMPLY WITH THE REQUIREMENTS OF THE FEDERAL MAGISTRATES ACT WHEN IT FAILED TO REVIEW THE RECORD OF THE EVIDENTIARY HEARING BEFORE THE MAGISTRATE OR TO REHEAR THE TESTIMONY

The Federal Magistrates Act provides that upon timely written objection to the magistrate's findings, a judge "shall make a de novo determination" with respect to those portions of the magistrate's findings to which objection is made. 28 U.S.C. § 636(b)(1).

It is well settled that a "de novo determination" requires the district

court to review the complete record of the hearing before the magistrate, i.e., the transcript or a tape recording. United States v. Lewis, 621 F.2d 1382, 1387 (5th Cir. 1980), cert. denied, 101 S.Ct. 1400 (1981); United States v. Marshall, 609 F.2d 152, 155 (5th Cir. 1980); Bowman v. Bordenkircher, 522 F.2d 209, 210 (4th Cir. 1975); Campbell v. United States District Court for the Northern District of California, 501 F.2d 196, 206 (9th Cir.), cert. denied, 419 U.S. 879 (1974); Reed v. Board of Election Commissioners of the City of Cambridge, 459 F.2d 121, 123 (1st Cir. 1972).

In the instant action, there was no transcript of the proceedings and the District Court failed to listen to the tape recording which no longer exists. Instead, the court relied on the erroneous report of the Magistrate and

thereby compounded the Magistrate's errors by, e.g., finding that Sabet's attorney did not give crucial testimony which he both did give and so stated in a subsequent affidavit.

In the absence of a complete record with which to make the required "de novo determination" the District Court was obligated to rehear the brief testimony. See United States v. Raddatz, ___ U.S. ___, 100 S.Ct. 2406 (1980). The Federal Magistrates Act is a relatively new statute. Guidance from this Court is necessary as to its proper meaning and application.

II

THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT PURSUANT TO THE IRAN-UNITED STATES AGREEMENTS AND THE RECENT DECISION OF THIS COURT, UNITED STATES COURTS LACKED JURISDICTION TO ENTER JUDGMENT AGAINST AN IRANIAN NATIONAL

The Iran-United States Agreements

conferred exclusive jurisdiction on the Iran-United States Claims Tribunal of any claim between a United States "institution" and an Iranian "national".

The District Court below entered judgment against an Iranian citizen. The Second Circuit refused to set aside the judgment. The courts below were ousted of jurisdiction, and the judgments below should be vacated. Dames & Moore v. Regan, 453 U.S. ___, 101 S.Ct. 2972 (1981).

A determination requiring AMEX to claim only pursuant to the mechanism set forth in the Iran-United States Agreements is especially appropriate, because AMEX's claim is against Dollar Account No. 2, which is fully and excessively funded. Dames Moore's claim was against Dollar Account No. 1, which may have to be replenished when exhausted.

The Iran-United States Agreements provided for the full and complete funding of Dollar Account No. 2. That fund consists of more than $1,718 billion. Claims of United States banks with non-syndicated loans are only about $700 million. The Iran-United States Agreements clearly provided that Dollar Account No. 2 was the exclusive mechanism for American banks to satisfy their claims against Iranian nationals. While non-bank claimants do not have their claims fully funded, bank claimants do have all of their claims fully funded.

Therefore, there are even more compelling reasons to require AMEX to comply with the Executive Orders and Agreements which this Court upheld in Dames & Moore v. Regan than existed when this Court required Dames & Moore thus to comply.

III

THE COURT OF APPEALS ERRED IN FAILING TO FIND BOTH THAT (A) THE SATISFACTION OF OUTSTANDING OBLIGATIONS, AND (B) IMPAIRMENT OR RETENTION OF COLLATERAL DISCHARGES THE OBLIGOR

AMEX was never required to explain what it did with the collateral, nor was defendant ever permitted discovery with respect to this matter. It is a fundamental principle of the law of suretyship that the satisfaction of the outstanding obligation discharges the surety. A. Stearns, Law of Suretyship, §§ 6.42, 6.52 (5th Ed. 1951); 72 C.J.S. Principal And Surety, §§ 140, 142 (1951).

AMEX has satisfied the outstanding obligations by its retention of the collateral, thus exonerating Hormoz Sabet from liability as a guarantor. Moreover, the satisfaction of the obligation discharges a co-obligor. Gilleran v. Owens,

182 App.Div. 580, 169 N.Y.S. 958, 959 (1st Dep't 1918); Ross v. Worth Electric Supply Co., 100 Misc.2d 1058, 420 N.Y.S. 2d 441, 443 (New York County 1979).

This principle is codified in New York General Obligations Law § 15-103 (McKinney 1978), which provides:

> "The amount of value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety."

In the instant action, the pledge of the shares as collateral was made by Firooz and Iramoz to secure the loan of Habib Sabet. Upon default, the pledged collateral was available to AMEX. The pledgors therefore were not in a relation of surety to Hormoz Sabet, but were

simply co-obligors whose satisfaction of the outstanding debt must be credited to Hormoz Sabet.

In addition, this principle that satisfaction of the obligations discharges Sabet's liability is accorded recognition by the tenets of the Uniform Commercial Code § 3-601(2)(McKinney 1964). Section 3-601(2) provides that

> "Any party is also discharged from his liability on an instrument to another party by any other act which would discharge his simple contract for the payment of money." [Emphasis supplied]

AMEX's satisfaction of the obligations by use of the collateral discharges Sabet and, in any event, raises material issues of fact which preclude a grant of summary judgment. At a minimum, discovery is necessary to resolve this question.

Section 3-606(1)(b) of the New York Uniform Commercial Code (McKinney 1964) ("UCC"), provides that:

> "The holder discharges any party to the instrument to the extent that . . . the holder unjustifiably impairs any collateral for the instrument given . . . on behalf of the party . . . ."

In construing the section of the UCC covering the impairment of collateral and the reference to "any party", the New York Court of Appeals noted that the UCC had expanded the scope of the "old Negotiable Instruments Law which referred only to the discharge of persons secondarily liable on the instrument" to include primary obligors. Indianapolis Morris Plan Corp. v. Karlen, 28 N.Y.2d 30, 34, 319 N.Y.S.2d 831, 834 (1971). Subsequently, Mikanis Trading Corp. v. Block, 59 App.Div.2d 689, 690, 398 N.Y.S. 2d 679, 681 (1st Dep't 1977) assured that accomodation parties such as Sabet may

complain of unjustifiable impairment of collateral. In addition, Mikanis refused to limit this defense to accomodation parties and thus it is equally applicable to guarantors.

Hormoz Sabet, as a co-signer, and therefore an accomodation party and a guarantor, is a party who is secondarily liable and under Karlen was discharged by AMEX's unjustifiable impairment of collateral.

IV

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Lynne M. Barry
Coudert Brothers
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April, one thousand nine hundred and eighty-two.

Present:

HON. LEONARD P. MOORE,

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Plantiff,

v.

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants,

HORMOZ SABET,

Defendant-Appellant.

81-7370

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Following argument of this appeal on December 10, 1981 before the undersigned, we remanded the case by an order dated December 11, 1981 to Judge Conner for a statement regarding the tape recording of testimony before Magistrate Washington.

Judge Conner on December 23, 1981 filed his statement pursuant to our remand. Having examined Judge Conner's statement and having reviewed the record as a whole, as well as the briefs of the parties and having considered the oral arguments of counsel, we are satisfied that the judgment of the district court should be, and the same hereby is, affirmed.

s/ Leonard P. Moore
Hon. Leonard P. Moore

s/ William H. Timbers
Hon. William H. Timbers

s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
NEW YORK 10007

A. Daniel Fusaro
Clerk

PLEASE REFER TO THIS COURT'S DOCKET NUMBER IN ALL MATTERS

April 5, 1982

Re: American Express International
v. Hormoz Sabet
81-7370

Dear Sir:

The Court has today handed down a decision in the above entitled cause affirmed the decision of the district court.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. DANIEL FUSARO,Clerk

By: Eileen Richards
Assistant Clerk

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of December, One Thousand Nine Hundred and Eighty-one.

PRESENT:
HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges

- - - - - - - - - - - - - - - - - - - x

AMERICAN EXPRESS INTERNATIONAL BANKING CORP.,

Plaintiff-Appellee,

v.

ORDER
81-7370

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants,

HORMOZ SABET,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - - - x

On this appeal from a grant of partial summary judgment against appellant Hormoz Sabet, a dispute exists as to whether appellant was personally served

with process. This factual issue was resolved in plaintiff-appellee's favor by Magistrate Ruth Washington, to whom the matter was referred by Judge Conner. Thereafter, Judge Conner adopted the Magistrate's report. However, it is not clear from the record whether Judge Conner listened to the tape recording of the testimony given before Magistrate Washington before arriving at his decision; no stenographic transcript was made.

Pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, we remand the matter to the district court so that the district court may supply this information presently omitted from the record. A simple statement over the signature of the district judge will suffice for this purpose.

s/ Leonard P. Moore
Hon. Leonard P. Moore

s/ William H. Timbers
Hon. William H. Timbers

s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

Dated: December 11, 1981

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Plaintiff,

- against -

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants.

79 Civ. 4203 (WCC)

81-7370

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Plaintiff-Appellee,

- against -

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants,

HORMOZ SABET,

Defendant-Appellant.

STATEMENT ON REMAND

By order dated December 11, 1981, this action was remanded to this Court by the United States Court of Appeals for the Second Circuit for the purpose of

eliciting a statement as to whether, before rendering my decision, I had listened to the tape recording of the testimony before Magistrate Ruth Washington.

The brief answer to the question is that I did not listen to the tape recording made by Magistrate Washington. However, I believe the following information supplied to me today by Magistrate Washington is relevant to the Court's inquiry.

As is her practice generally, Magistrate Washington asked counsel whether they desired to have a stenographic transcript made of the hearing before her, and counsel for both parties indicated that they did not. Magistrate Washington thereupon indicated that, in accordance with her usual procedure, she would make a tape recording of the hearing testimony for her own use. It is the customary practice of the Magistrate to

preserve such tape recordings for approximately 10 to 20 days after issuing her recommended decision to allow time for the parties to file objections pursuant to 28 U.S.C. §636(b)(1). Because the objections filed by defendant-appellant did not contain a request that the Court listen to the tape recording or that the tape recording be made part of the record, she feels sure that, in accordance with her customary practice, she erased the tape not later than about 20 days after February 10, 1981 (and before I began review of the relevant materials in preparation for my decision of April 6, 1981). Magistrate Washington volunteered to supply upon request an affidavit setting forth these facts.

Before me, defendant-appellant never suggested that I listen to the tape recording, but instead requested that I make a de novo determination either after

a second evidentiary hearing or on the basis of affidavits submitted by defendant-appellant summarizing the testimony before Magistrate Washington. I adopted the second suggestion.

s/ William C. Conner
United States District Judge

Dated: New York, New York
December 23, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Plaintiff,

-against-

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants.

79 Civ. 4203 (WCC)

- - - - - - - - - - - - - - - - - - x

REPORT AND RECOMMENDATION

TO: THE HONORABLE WILLIAM C. CONNER, U.S.D.J.

The above entitled matter was referred by Your Honor on September 22, 1980 for an evidentiary hearing on the question of whether there had been valid personal service upon defendant Hormoz Sabet. A hearing having been held in the matter on October 31, 1980 with the question arising as to whether or not there had also been effective substituted service of process on Hormoz Sabet, and this last issue having been raised be-

latedly, Your Honor amended the original order on October 24, 1980 to include the determination of this question as well as the original one of valid personal service.

After two hearings with oral argument which included the testimony of plaintiff's witnesses, namely, David Long, Esq., Carl Kornbluth and Vanham Eminian, Vice President of American Express International Banking Corporation, as well as the defendant himself, Hormoz Sabet, and Mark Lebow, Esq., a partner in Coudert Brothers and defendant's counsel for other matters, and careful consideration of the exhibits, relevant case law and treatises, it is concluded by the undersigned that Hormoz Sabet was personally served in this action by the plaintiff although the attempted substituted service was invalid.

DISCUSSION

There was a great deal of conflicting testimony inasmuch as Hormoz Sabet, the defendant, claimed that on the date of August 3, 1980, when Carl Kornbluth, the plaintiff's process server, stated he visited the Gulf Associates offices with the summons to serve on Hormoz Sabet, that he was not the person to whom these papers had been delivered. In fact, defendant Hormoz Sabet contended that at the time the process was allegedly served, namely, 2:55 P.M., he was in the offices of Coudert Brothers, 200 Park Avenue, the Pan Am Building, consulting with his counsel, Mr. Mark Lebow, preparing for other litigation. Mr. Lebow confirmed this, but was not positively certain that defendant had been in his presence at that exact time and, in fact, admitted that he and Hormoz Sabet were not together during the entire period. Mr.

Lebow's only conclusive testimony was that he and Hormoz Sabet worked together for a certain amount of time and then left together at approximately 4:00 P.M. for an appointment outside the City. Further, although this testimony was directed at establishing the fact that Hormoz Sabet was not the man pointed out by the receptionist to the process server, plaintiff suggested that the testimony did not totally exclude the possibility that Sabet returned briefly to his office a block away. In addition, plaintiff pointed out defendant could have called the receptionist; however, the plaintiff also could have produced her as a witness.

It is to be noted that although the defendant Sabet also insisted that Gulf Associates at 30 Rockefeller Plaza was not his office for all purposes, this testimony was diluted by plaintiff's

Exhibit #12. Exhibit #12 was a loan agreement dated December 6, 1977, signed by Hormoz Sabet, consenting to the "commencement of any action and the service of any process at any place where the borrower (Hormoz Sabet) resides or conducts business or has any property or may be served with process." (Plaintiff's Exhibit #12 at ¶8). The loan agreement identified Gulf Associates, Rockefeller Plaza, as defendant's place of business (Plaintiff's Exhibit #12 at pg. 2).

Although part of Kornbluth's testimony was unclear and imprecise, it is believed his oral testimony in general was credible and, combined with his affidavit of service, substantiates plaintiff's position of having validly personally served defendant Hormoz Sabet. Therefore, despite Mr. Sabet's affidavit dated October 25, 1979 (Plaintiff's

Exhibit #5), and his testimony, it is determined that valid personal service was made upon him.

It must be stressed, however, that plaintiff's claim to have served the defendant, Hormoz Sabet, by substituted service of process under Section 308(2) of the CPLR is not founded. Plaintiff's attempted substituted service did not meet the requirements of that Section.(1)

(1) The pertinent part of Section 308 reads as follows:

"Personal service upon a natural person shall be made by any of the following methods: . . .

(2) By delivering the summons within the State to a person of suitable age and discretion at the actual place of business . . . of the person to be served and by mailing the summons to the person to be served at his last known residence; proof of service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service . . . . " (Emphasis added)

The requirement that the summons was to be delivered to a person of suitable age and discretion at the actual place of business was not met. Plaintiff attempted to use the service of the summons on August 3, 1980 at Gulf Associates for two purposes. If it was not accepted as being served personally on defendant Hormoz Sabet, then plaintiff wanted it to be used as service upon someone of "suitable age and discretion." This is not possible. Either Mr. Kornbluth's affidavit is correct and he actually served a person who identified himself as being Hormoz Sabet, or he did not, and his affidavit is false. The plaintiff cannot have it both ways. Further, inasmuch as Section 308(2) requires not only that proof of service should be filed but that such proof should identify the person of suitable age and discretion, plaintiff has not, and apparently cannot, identify

the person except as the defendant.[2] Even though plaintiff acknowledged that it failed to file this proof, plaintiff correctly points out that case law supports the proposition that failure to file proof of service may be cured since it is not a jurisdictional defect. Failure to file timely proof of substituted service does not invalidate the service but is an irregularity which may be corrected nunc pro tunc when no prejudice is shown.[3] But plaintiff would be in no position to file such proof.

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[2] It could be argued, however, if plaintiff did not try to use this service as personal service on defendant, that handing the papers to the person in the defendant's office was serving a person of suitable age and discretion. See 206 E. 63rd St. Corp. v. Price, ___ App. Div.2d ___, 426 N.Y.S.2d 806 (2d Dept. 1980).

[3] Reporter Company, Inc. v. Tomicki, 60 App. Div.2d 947, 401 N.Y.S.2d 322 (3rd Dept. 1978); Rudela v. Posner, 70 Misc.2d 726, 334 N.Y. Supp. 2d 985 (S. Ct. Ulster Co. 1972).

Plaintiff also argued fair notice, citing certain examples to prove that Hormoz Sabet knew about the action against him and that Sabet had appeared and subjected himself to the jurisdiction of the court by interposing a counterclaim. We find otherwise. The fact that the defendant Sabet admitted to having learned from his father Habib Sabet, about the service of a summons on the father on August 1, 1980; the fact that he admitted to receiving some papers mailed to his residence; the fact that he submitted an affidavit and prepared defenses as well as a counterclaim in this action was not a submission to the jurisdiction of the court although these facts might have constituted fair notice so as to satisfy

the purpose of the statute.[4]

The object of all service of process is to give notice to the party upon which service is an issue so that he may be aware of and resist or defend himself in the action.[5] Here, although we can agree that defendant Hormoz Sabet had ample notice as is evidenced by his own testimony and affidavit, the Court must reject plaintiff's assertion that valid substituted service was effected pursuant to Section 308(2) of CPLR.[6]

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(4) New York courts have held that the submission of an affidavit on the merits does not constitute a general appearance. See, e.g., 527 Madison Avenue Co. v. DeLoy Executive Service, Inc., 36 App. Div.2d 502, 321 N.Y.S.2d 811 (1st Dept. 1971), motion denied in part and dismissed in part, 29 N.Y.2d 794, 327 N.Y.Supp.2d 359, 277 N.E.2d 408, cert. denied, 405 U.S. 989 (1972).

(5) Federal National Mortgage Assoc. v. Graham, 67 Misc.2d 735, 324 N.Y.S.2d 827 (S. Ct. Kings Co. 1971); Smithtown General Hospital v. Walter Quinlivan, 88 Misc.2d 1031, 389 N.Y.S.2d 776 (Dist. Ct. Suffolk Co. 1976).

(6) See, e.g., Karlin v. Avis, 326 F. Supp. 1325 (E.D.N.Y. 1971).

Further, in this instance, with the facts of this case, the Court must reject plaintiff's argument that service need not comply with the literal terms of the applicable statute if the service did accomplish its intended purpose, i.e., giving fair and adequate notice to the defendant of the commencement of an action against him.[7]

CONCLUSION

Based on the foregoing, it is the considered conclusion of the undersigned that plaintiff's personal service was valid. However, substituted service was not effectually carried out in accordance with Section 308 of the CPLR.

Pursuant to 28 U.S.C. Section 636,

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[7] Cf. Lumbermens Mutual Casualty Co. v. Borden Co., 268 F. Supp. 303 (S.D.N.Y. 1967); Smithtown General Hospital v. Walter Quinlivan, supra, note 2.

as amended, the parties shall have ten days within which to lodge written objections to the foregoing report with the Honorable William C. Conner. Such objections shall be filed with the Clerk of the Court with extra copies delivered to the Chambers of Judge Conner, Room 608, and the Chambers of the undersigned, Room 121.

Dated: New York, New York
February 10, 1981

Respectfully Submitted,

s/ Ruth V. Washington
RUTH V. WASHINGTON
United States Magistrate

Copies of the foregoing Report and Recommendation have been mailed this date to the following:

John F. Pritchard, Esq.
Messrs. Winthrop Stimson Putnam and Roberts
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Jerry L. Siegel, Esq.
Coudert Brothers
200 Park Avenue
New York, New York 10166

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION, Plaintiff,	79 Civ. 4203 (WCC)
- against -	
HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION, Defendants.	OPINION AND ORDER

CONNER, D. J.:

This case is presently before the Court on objections filed pursuant to 28 U.S.C. §636(b)(1) to the Report and Recommendation of Magistrate Ruth V. Washington dated February 10, 1981.

Background

In an Opinion and Order of August 29, 1980, this Court granted plaintiff's motion for summary judgment against Habib and Iradj Sabet and indicated that summary judgment would also be appropriate as to defendant Hormoz Sabet if

Hormoz had been properly served. The Court directed Hormoz Sabet to submit an affidavit clarifying his contention that he had not been served in light of the specific averments in the affidavit of Carl Kornbluth, plaintiff's process server, that Kornbluth had handed papers to Hormoz Sabet at 2:55 P.M. on August 3, 1980 in the offices of Gulf Associates at 30 Rockefeller Plaza. When Hormoz Sabet filed an affidavit specifically denying that he had been so served, the Court referred the matter to Magistrate Washington for a hearing on this factual dispute.

Magistrate Washington conducted the hearing on October 8 and October 31, 1980. Testimony included that of Kornbluth, Hormoz Sabet, Mark Lebow, a partner at Coudert Brothers, Hormoz Sabet's attorneys, David Long, an associate at Winthrop, Stimson, Putnam & Roberts,

attorneys for plaintiff, and Vahan Emenian, vice-president of plaintiff. The Magistrate concluded that the testimony of Kornbluth, supported by his contemporaneous log notes, that he had handed the papers to a man pointed out to be Hormoz Sabet by the receptionist at Gulf Associates, a Sabet-controlled corporation, and identifying himself as Hormoz Sabet, was credible. The Magistrate rejected the testimony of Hormoz Sabet that he had not been so served because he had spent the entire afternoon at the offices of Coudert Brothers; she noted that the supporting testimony of Mark Lebow that he and Sabet had generally spent the afternoon of August 3 preparing defenses in another case did not specifically indicate that Hormoz had been in Lebow's presence at 2:55 or specifically negate the possibility that Hormoz Sabet had returned to his business headquarters

at Gulf Associates for a brief period of time during that afternoon.

In support of his objection to the Magistrate's decision, Hormoz Sabet has submitted his further affidavit and the affidavit of Mark Lebow. Lebow's affidavit states:

> "(a) Mr. Sabet was in fact at the offices of Coudert Brothers during the entire afternoon in question. On those few occasions when Mr. Sabet was not personally in my presence working on another litigation matter in which this office was representing him, he was working in a conference room located adjacent to my office; and
>
> "(b) The location at which Mr. Kornbluth claims to have served Mr. Sabet, 30 Rockefeller Plaza, was not 'a block away,' but rather, was located a sufficient distance across town that it would have been impossible for Mr. Sabet to have left the Coudert Brothers offices, gone to his office, and returned to the Pan Am Building without my having been fully aware of his absence. No such absence occurred at any time during the afternoon of August 3, 1979."

Hormoz Sabet's affidavit states:

"As both Mr. Lebow and I testified

> ... I was in fact at the offices of Coudert Brothers during the entire afternoon in question. On the few occasions I was not physically in Mr. Lebow's presence, I was in a conference room located adjacent to his office. At no time did I leave the Pan Am Building and go to the offices of Gulf Associates, at which Mr. Kornbluth claims to have served me. Furthermore, it should be noted that that location, 30 Rockefeller Plaza, is not 'a block away,' but rather a substantial distance across town."

Discussion

28 U.S.C. §636(b)(1) provides, in relevant part, that when a magistrate has made proposed findings and recommendations,

> "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

"De novo determination" in this context has been interpreted to require a review of the magistrate's proposed findings and an exercise of sound judicial discretion with respect to whether reliance should

be placed on those findings; the reviewing court is not obligated to rehear the testimony adduced at the hearing. United States v. Raddatz, ___U.S. ___, 48 U.S.L. W. 4813, 4815-16 (June 23, 1980).

Here, Magistrate Washington's report shows that she carefully reviewed the conflicting testimony of Kornbluth and Hormoz Sabet and the testimony of Lebow in support of Sabet's testimony. She correctly noted that the testimony of Lebow at the hearing was not inconsistent with the version of events given by Kornbluth. She found that Kornbluth's testimony that he had handed papers to an individual identifying himself as Hormoz Sabet was credible after having an opportunity to observe Kornbluth's demeanor under direct and cross-examination. The fact that Kornbluth did not make an absolute identification of Hormoz Sabet at the hearing, but testified only that

Hormoz Sabet "closely resembled" the individual who identified himself as Hormoz Sabet on August 3 before the papers were handed to him, does not indicate that the Magistrate's credibility determination was incorrect, especially since Kornbluth, a professional process server, had surely served many persons (though not, perhaps, the 600 per month he estimated in his hearing testimony). Magistrate Washington rejected Hormoz Sabet's conflicting testimony as to his whereabouts at 2:55 on August 3 after a similar opportunity to observe Sabet's demeanor as a witness. In addition to observing that Lebow's testimony left open the possibility that Sabet had returned to Gulf Associates around 2:55, she noted that neither side had called the receptionist at Gulf Associates, a witness presumably under Hormoz Sabet's control, to corroborate its version of the events at the Gulf

Associates office. Her proposed finding that Kornbluth's testimony, as bolstered by his contemporaneous records, was more worthy of belief than the testimony of Sabet, an obviously interested party, whose version of events was only partially supported by the testimony of his attorney, Mark Lebow, appears wholly reliable.

The further submissions to this Court by Hormoz Sabet and Lebow do not significantly alter the reliability of the Magistrate's proposed findings. As to Lebow's affidavit, the Court notes that he did not attempt to present this testimony at the hearing, where he would have been subject to cross-examination and where his demeanor could have been observed and his credibility assessed; that although he gives his opinion in the affidavit that Hormoz Sabet could not have left Coudert Brothers without his

noticing Sabet's absence, Lebow does not indicate at what time during the "afternoon in question" Sabet arrived at Coudert Brothers or specify that Lebow saw or spoke to Sabet at or around 2:55; and that Coudert Brothers' offices in the Pan Am Building, while not one block away from Rockefeller Plaza, as the Magistrate states, are only eight blocks away from the offices of Gulf Associates, no more than a 15-minute walk and an even faster taxi ride. Sabet's affidavit adds no new facts and, again, must be read in light of his interest in avoiding immediate entry of summary judgment against him in the substantial amount involved here.

Accordingly, I accept the Magistrate's proposed finding that Hormoz Sabet was personally served on August 3, 1980. In accordance with my previous Opinion and Order, there being no just reason for delay, I direct that final judgment be

entered against Hormoz Sabet pursuant to Rule 54(b), F.R.Civ.P., in the amounts described in that Opinion and Order. Plaintiff shall submit a proposed judgment on five days' notice within five days of the date of this Opinion and Order.

SO ORDERED.

s/ William C. Conner
United States District Judge

Dated: New York, New York
April 6, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION, : 79 Civ. 4203 (WCC)

Plaintiff, :

- against - :

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION, :

Defendants.

- - - - - - - - - - - - - - - - - - x

OPINION AND ORDER

A P P E A R A N C E S:

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J. L. SIEGEL, ESQ.,
L. M. BARRY, ESQ.,
J. D. POPE, ESQ.,
Of Counsel

CONNER, D. J.:

This removed case is before the Court on the motions of plaintiff American Express International Banking Corporation ("AEIBC") to confirm the attachment order issued in state court and for summary judgment in lieu of complaint pursuant to N.Y.C.P.L.R. §3213, and on defendants' cross-motion to vacate the attachment.

Background

This is an action to recover $3,232,930.14 allegedly due and owing under three promissory notes executed by defendant Habib Sabet and co-signed by defendants Hormoz and Iradj Sabet, Habib's sons, on September 26, 1977, December 9, 1977 and January 28, 1978. Plaintiff also sues on two unconditional, undated guarantees of any obligations of Habib Sabet to AEIBC executed by Habib and Iradj Sabet, and on a corporate guarantee

of Habit Sabet's obligations to AEIBC executed by defendant Firooz Corporation ("Firooz") on September 12, 1977. (Firooz, an Iranian corporation, was controlled by the Sabets until its expropriation by the Islamic Provisionary Revolutionary Government of Iran in 1979.)

On July 9, 1979, plaintiff obtained an order of attachment in New York County Supreme Court pursuant to N.Y.C.P.L.R. §6211 of the property of Habib Sabet, Iradj Sabet and Firooz Corporation, and levy was made by the Sheriffs of New York and Westchester Counties.

Defendant Habib Sabet was personally served in New York with a summons and notice of motion, as provided for in C.P.L.R. §3213, on July 30, 1979. As discussed below, the parties have submitted conflicting affidavits with respect to personal service on defendant

Hormoz Sabet. Iradj Sabet and Firooz Corporation were served on September 7, 1979 by personal delivery of the summons and notice of motion to David H. Jackman, President of the United States Corporation Company, the agent designated for service of process by Iradj and Firooz in their respective guarantees.

In August 1979, the action was removed to federal court pursuant to 28 U.S.C. §1441. Federal jurisdiction is based on diversity of citizenship.

Documents

The first note in question is for the principal sum of $500,000, due August 31, 1979, with interest payable quarterly at 1-1/4% above the New York prime rate. The note provides, in relevant part, that:

> "If at any time: (a) the Borrower defaults in the payment of any sum due to [AEIBC] or in the payment of any other indebtedness or in the performance of any agreement with

> [AEIBC] or of any agreement relating to indebtedness; or ... (i) the holder of this Note deems itself insecure, then, in any such event, this Note shall become immediately due and payable without presentation or demand,which are hereby expressly waived ..... This Note shall bear interest after maturity at the higher of the rate specified above or 6% per annum. The Borrower shall pay all expenses (including reasonable attorneys' fees) incurred by the holder in connection with the enforcement of any of the provisions of this Note.... If there is more than one signatory to this Note, they shall be jointly and severally liable hereon and the term 'Borrower' shall refer to any or all of the undersigned."

The second note in question is for the principal sum of $1,500,000, due and payable in six equal consecutive installments on the last day of the sixth, twelfth, eighteenth, twenty-fourth, thirtieth and thirty-fourth calendar months after December 9, 1977. Interest is payable quarterly at a rate of 1-1/4% above the prime rate. The note further specifies that it is issued subject to

the terms of a Loan Agreement signed by Habib, Iradj and Hormoz Sabet on the same date, which, in turn, provides in relevant part that:

> "1....The term 'Loans' as used herein shall include any and all indebtedness, obligations and liabilities of any kind of the Borrower ... in which [AEIBC] shall have any interest, now or hereafter existing ...."
>
> * * *
>
> "2....In the event that (a) any sum payable upon any Loan shall not be paid when due, or (b) the Borrower shall fail to perform any agreement with [AEIBC], ... or ... (d) the financial responsibility of Borrower shall, in the sole opinion of [AEIBC], become impaired or unsatisfactory, ... then and in any such event, all Loans shall be due and payable forthwith without presentation or demand for payment, which are expressly waived, and thereafter all Loans shall bear interest at the legal rate (if higher than the rate then applicable thereto) ...."
>
> "3....Upon non-payment of interest or principal on any Loan when due ... (b) the Bank may without demand or payment ... enforce, collect and realize upon any security ....
>
> "4. The Borrower will pay all expenses (including legal fees ...)

> of or incidental to the enforcement of any of the provisions hereof ....
>
> * * *
>
> "10....If more than one person signs this agreement, they shall be jointly and severally liable hereunder ...."

The Loan Agreement and second note refer also to a Pledge Agreement. Paragraph 14 of the Loan Agreement states that:

> "This Agreement and the Loans due ... hereunder or under promissory notes evidencing such Loans are secured by a pledge of and security interest in certain Pledged Shares as defined in ... a Pledge Agreement, dated of even date herewith ... between the Borrower and the Bank ... as a condition precedent and prior to disbursement of any amounts of any Loan made by the Bank to the Borrower hereunder."

Two Pledge Agreements were signed on December 9, but these agreements were between two Iranian corporations controlled at that time by the Sabets, Firooz and Iramoz Corporation, respectively, and AEIBC rather than between the Sabets and

AEIBC, as suggested by Paragraph 14 of the Loan Agreement. The Pledge Agreements are substantially identical: each recites that Iramoz, or Firooz, is the owner of certain shares of the Industrial and Mining Development Bank of Iran ("IMD Bank"); that:

> "Mr. Habib Sabet ("Borrower") has entered into a Loan Agreement dated as of December 9, 1977 (said Loan Agreement as the same may be amended, modified or supplemented from time to time being the 'Loan Agreement'; terms defined in the Loan Agreement being used here as therein defined) with the Bank, and has executed one or more Promissory Note(s) the (the 'Note') in favor of the Bank pursuant thereto, and it is a condition to the making of the Loan by the Bank that this Agreement be executed and delivered;"

and that:

> "the Pledgor has agreed to pledge and grant a security interest (the 'Security Interest') in the pledged collateral as collateral security for all the indebtedness of the borrower under the loan agreement and the notes."

Each agreement provides that the

Bank shall exercise reasonable care with respect to the pledged shares. Each corporation thereafter pledged the specified IMD Bank shares as collateral security for payment of the December 9 note signed by Habib and co-signed by Hormoz and Iradj Sabet and for any other obligation incurred under the Loan Agreement.

The third note in question covers a loan of $1,500,000, payable in six equal consecutive installments on the last day of the sixth, twelfth, eighteenth, twenty-fourth, thirtieth and thirty-fourth months after January 28, 1978. Interest is payable as in the September 26 note. The borrowers again agree to pay for costs of collection, including legal fees, if there is a default in any payment due under the note. This note, like the December 9 note, refers to the default terms and the joint and several liability

of signatories terms set out in the Loan Agreement of December 9; and to certain further Pledge Agreements between AEIBC and Firooz Corporation and AEIBC and Iramoz Corporation dated January 28, 1978, covering a further pledge of additional IMD Bank shares. Two further Pledge Agreements were in fact executed by Firooz and by Iramoz Corporation on January 28. Again, each pledge is stated to be as a condition to the making of the January 28 loan to Habib Sabet under the terms of the December 9 Loan Agreement. Additional terms are substantially identical to those in the earlier Pledge Agreements. A total of 150,000 IMD Bank shares were pledged by either Firooz or Iramoz under the several Pledge Agreements.

The individual guarantees signed by Iradj and Hormoz Sabet provide, in relevant part, that:

"The undersigned in order to induce the Bank [AEIBC] ... to extend or continue the extension of credit or other financial accommodation ... to ... HABIB SABET (hereinafter called the Borrower) unconditionally guarantee[s] to the Bank payment of all liabilities of the Borrower ...

* * *

"1. ... 'Liabilities of the Borrower' as used herein means all indebtedness ... now or hereafter existing, of the Borrower to [AEIBC] ... whether joint or several, secured or unsecured ... and whether incurred by the Borrower as principal, surety, endorser, guarantor, accommodation party or otherwise ....

* * *

"2. ...The Bank may at any time ... without the consent of, or notice to, the undersigned, ... without impairing or releasing the obligation of the undersigned ...

"(1) change the manner, place or terms of payment ... or renew or alter any liability of the Borrower or any security therefor ....;

"(2) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner ... any property securing any Liability of the Borrower;

"3. ... The undersigned waive(s)

notice of the making or granting of any loan, extension of credit or other financial accommodation to or for the account of the Borrower, notice of any default in the payment or performance of any Liability of the Borrower and presentment, protest, notice of dishonor and demand for payment of or with respect to any Liability of the Borrower or any instrument or other writing evidencing or securing any Liability of the Borrower.

"4. ... No invalidity, irregularity or unenforceability (by reason of any bankruptcy or similar law, any law or order of any government or agency therefor purporting to reduce, amend or otherwise affect any Liability of the Borrower, or otherwise) of any Liability of the Borrower or of any security therefor shall affect, impair or be a defense to this Guaranty.

* * *

"6. If any Liability of the Borrower is not paid when due (irrespective of whether such Liability of the Borrower became due by passage of time, acceleration or otherwise), the obligations and liability of the undersigned under this Guaranty shall immediately become due and payable, without notice or demand ....

* * *

"15. The undersigned agree(s) that an action to enforce this Guaranty

> may be brought in any state or federal court of competent jurisdiction in the State of New York and hereby designate(s) United States Corporation Company, 70 Pine Street, New York, N.Y. 10005 as agent of the undersigned for the purpose of accepting service of any process within the State of New York ...."

Firooz's unconditional guarantee of Habib Sabet's liabilities to AEIBC contains similar provisions as to consideration, due date, and waiver of notice, and similarly designates United States Corporation Company as agent for service of process.

A majority of the notes and other related documents were executed in New York; those documents which were not so executed were mailed from New York for execution and returned to New York by the Sabets after execution. The Loan Agreement specifically provides for payment in New York. All documents state that they are to be governed by New York law.

Contentions

Plaintiff contends that the interest payment due February 28, 1979 and all succeeding interest payments due on the first note have not been made, and that, accordingly, and also as a result of defendants' default on the other two notes, $500,000 in principal and $43,381.96 in interest, plus AEIBC's costs in enforcing the note, are presently due and owing. As to the second note, plaintiff contends that the interest payment due January 3, 1979, and all succeeding interest payments, have not been made, and that, accordingly, and also as a result of defendants' default on the September 26 and January 28 notes, $1,250,000 in principal and $117,704.44 in interest, plus enforcement expenses, is due and owing. Under the January 28 note, plaintiff contends, the interest payment due February 5, 1979 and all succeeding

interest payments due have not been paid, and this, along with defendants' default on the first two notes, makes the note due and payable, so that $1,250,000 in principal, $117,343.75 in interest and AEIBC's expenses are due and owing. Plaintiff also contends that, since Habib Sabet's obligations under the three notes are due and payable, the obligations of Iradj and Hormoz Sabet under their individual guarantees and of Firooz under its corporate guarantee are in effect.

Plaintiff further asserts that this Court has personal jurisdiction over all these defendants, sufficient both under New York law and under due process requirements, by virtue of both the contacts of each defendant with this jurisdiction during the course of negotiation and execution of these notes and related documents, by virtue of the parties' additional contacts with this juris-

diction, such as defendant Habib and Iradj Sabet's periodic visits to the United States for commercial purposes, Hormoz Sabet's residence in New York City, and Habib and Iradj Sabet's interest in Gulf Associates, Inc., a corporation with its principal place of business in New York City, and by virtue of Hormoz, Iradj and Firooz's naming of a New York corporation as agent for service of process in their respective guarantees.

The Sabets[1/] raise three lines of defense. First, they contend that nothing is due to AEIBC from any of these defendants due to AEIBC's conduct in impairing the value of the IMD Bank shares pledged by Firooz and Iramoz under the Pledge Agreements. These defendants assert that the proceeds of the loans in question were used by Firooz Corporation, at that time controlled by the Sabets; that after the Iranian Government expropriated

all the business and financial holdings of the Sabets in Iran, including Firooz and Iramoz Corporation, and restricted transfers of currency out of Iran, further payment under the loans "became impossible"; that AEIBC had complete and unconditional power to sell or otherwise dispose of the pledged shares, subject to the provision of the Pledge Agreements requiring AEIBC to exercise reasonable care in the custody of the collateral; when Iran began to become politically unable in December 1978, but while the Teheran Stock Exchange was still in operation, Habib Sabet instructed AEIBC to sell the IMD Bank shares pledged by Firooz and Imaroz Corporation, which sale would have generated revenue sufficient to satisfy all the Sabet's outstanding obligations to AEIBC; that Harmoz and Habib Sabet repeated these instructions to AEIBC "[o]n several occasions" in February, March and April 1979; that AEIBC did not sell

the shares as instructed; and that, accordingly, AEIBC foreclosed on the collateral and accepted the pledged shares in satisfaction of the loans, or, alternatively, impaired the value of the collateral and breached its duty to exercise reasonable care with regard to the collateral under the Pledge Agreements; or, again alternatively, disposed of the collateral in a commercially unreasonable manner. The Sabet defendants state that these activities by AEIBC also give rise to a counterclaim for damages against AEIBC comparable to the amounts claimed by plaintiff here.

Secondly, the Sabet defendants suggest that the loans at issue have been paid as a result of set-off rights exercised by plaintiff following its commencement of a suit against the Government of Iran and its political subdivisions, President Carter's executive orders

relating to disposition of Iranian assets held in the United States, and the United States Treasury Department's Iranian Assets Control Regulations; and, to the extent they have not been set off, may give rise to a counterclaim in favor of the Sabet defendants under N.Y. General Obligations Law § 15-103.

Finally, the Sabets assert that this Court lacks personal jurisdiction over defendants Hormoz and Iradj Sabet, since neither has been properly served with process.

Discussion

1. Habib and Iradj Sabet

The Court concludes that it has personal jurisdiction over Habib and Iradj Sabet and that plaintiff's motion for summary judgment should be granted as to those defendants.

a. Personal jurisdiction

Defendant Habib Sabet was personally

served in this jurisdiction. This comports with the requirements of N.Y.C.P.L.R. § 308. Iradj Sabet was served by serving the agent designated in his guarantee agreement. This also comports with C.P.L.R. Sections 308 and 318. Both defendants have had numerous business contacts with New York relating to the negotiation, execution and repayment of these loans, making jurisdiction proper under both the transaction of business provisions of C.P.L.R. Section 302 and under the due process principles outlined in, e.g., World-Wide Volkswagen Corporation v. Charles S. Woodson, ___U.S.___, 48 U.S.L.W. 4079 (1980). Accordingly, the Court concludes that it has personal jurisdiction over both defendants. See Republic National Bank v. Sabet, No. 79 Civ. 4290 (S.D.N.Y. 1980 (Conner, J.).

b. Defenses relating to AEIBC treatment of IMD Bank Shares

The first line of defense raised by these defendants may be broken down into four arguments: first, that AEIBC's actions in failing to sell the IMD Bank shares pledged by Firooz and Iramoz after instruction by the Sabets to do so (assuming, for purposes of this motion, that such instruction was given and received) discharges defendants from any obligations on the notes under UCC Sections 3-606 and 9-207; second, that AEIBC's actions amounted to a retention of the collateral in complete satisfaction of defendants' obligations (i.e., a strict foreclosure) under UCC Section 9-505(2), thus creating a complete defense to AEIBC's claim against these defendants; third, that AEIBC's treatment of the collateral was not a commercially reasonable disposition within the meaning of UCC Section 9-504(3), forming a defense and giving rise to a counterclaim

in favor of defendants under UCC Section 9-507; and fourth, that AEIBC's actions were in breach of its obligations under the Pledge Agreements to exercise reasonable care in the custody of the pledged collateral. The Court finds none of these persuasive.

The first argument here rests on the following language in Section 3-606:

> "(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> * * *
>
> "(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

Section 9-207 defines impairment of collateral. Under that section, a secured party is required to "use reasonable care in the custody and preservation of collateral in his possession."

These sections have been applied to

discharge a party to a loan transaction other than the party actually pledging collateral which was subsequently unjustifiably impaired, but only when the party seeking discharge was entitled to look to the collateral for reimbursement of any payment made to the creditor, either as a result of the discharged party's position with respect to the creditor -- e.g., as a guarantor with a right to be subrogated to the creditor's right against the collateral, see Indianapolis Morris Plan Corp. v. Karlen, 319 N.Y.S. 2d 831 (1971); Mikanis Trading Corp. v. Block, 398 N.Y.S.2d 679 (1st Dept. 1977) -- or as a result of the discharged party's status as co-maker or accommodation party with respect to the owner of the collateral, entitling the discharged party to contribution or indemnification from the owner, see Beneficial Finance Co. of New York, Inc.

v. Husner, 369 N.Y.S.2d 975 (Sup. Ct. Wayne Co. 1975). Habib and Iradj Sabet have no such right here, either by virtue of any direct relationship such as that of co-obligor with Firooz, or by any right to be subrogated to AEIBC's claim to the pledged shares. Thus, even assuming that the collateral here was unjustifiably impaired, these defendants should not be discharged from their direct and secondary obligations under the notes, Loan Agreement and guarantee agreement. See Commerce National Bank v. Baron, 336 F.Supp. 1125 (E.D.Pa. 1971) where release of collateral would have no prejudicial effect on defendant, defendant not entitled to assert Section 3-606 defense); Beneficial Finance, supra.

Similarly, these defendants may not raise those provisions of Article 9 covering disposition of collateral as a defense. UCC Section 9-105(d) defines

"debtor" under the article as

> "... the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral ... Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires."

Section 9-504(3) specifies methods under which a secured party may dispose of collateral following a default.[2/]

Section 9-505(2) provides for a secured party's retention of collateral in satisfaction of the obligation secured.[3/]

Section 9-507(1) provides that:

> "If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure

to comply with the provisions of this Part ...."

Since these defendants are not owners of the collateral, and sections 9-504, 505 and 507 deal with owner's rights and creditor's obligations in connection with treatment or disposition of collateral, it does not appear that defendants are "debtors" within the meaning of Section 9-105(d) for purposes of asserting the rights established by 9-504, 505 and 507. The term "debtor" has been construed to extend beyond the owner of the collateral to a non-owner obligor such as a guarantor or other party with right of recourse against the collateral, or claim for contribution or reimbursement, see Chase Manhattan Bank, N.A. v. Natarelli, 401 N.Y.S.2d 404 (Sup.Ct. Monroe Co. 1977) (guarantor's right to notice of sale under 9-504(3)); Northern Financial Corp. v. Chatwood Coffee Shop,

4 UCC Rep. Serv. 674 (Sup.Ct. N.Y. Co. 1967) (endorser of corporate notes, claim under 9-505(2)). However, to extend the provisions of Sections 9-504, 505 and 507 to cover a party whose obligations are wholly independent from those of the pledgor providing the collateral at issue, and who has no right of recourse against the collateral either via subrogation or under a claim for contribution or reimbursement from a co-obligor, see discussion supra, goes far beyond the holding in Chase and makes little commercial sense in the context of this transaction, where Firooz is a corporate entity distinct from the Sabets and in effect acted as an accommodation party for the Sabets, rather than vice versa.

Nor have these defendants come forward with any facts under which the Court could find that defendants had a right to assert AEIBC's obligation under

its Pledge Agreements with Firooz and Iramoz Corporation -- agreements to which, the Court notes, defendants were not parties -- as a defense to this action. In particular, as to a possible third-party beneficiary theory, the documents and affidavits indicate that the loan transactions were made for the benefit of Firooz, not the Sabets.

c. Setoff

The second line of defense -- the asserted setoff of Iranian assets against this claim -- is without merit in this case for the reasons stated in this Court's opinion in Republic National Bank, supra: there is here, as in Republic, no finality to the setoff and no showing that AEIBC will in fact be able to recover any of the frozen Iranian assets in light of the sizeable claims currently pending against such funds.

2. Hormoz Sabet

The discussion as to defendants Habib and Iradj Sabet applies with equal force to defendant Hormoz, and would lead to a similar ruling were it not for a dispute as to whether Hormoz was personally served in this action. Hormoz Sabet states in his affidavit of September 25, 1979 that:

> "AMEX has not made personal service upon me, at my home, my office or elsewhere, of any summons, motion papers, or other documents in this action, either while the action was pending in the Supreme Court of the State of New York, or following the removal of this action to the United States District Court for the Southern District of New York on August 10, 1979."

In opposition, AEIBC offers the affidavit of Carl Kornbluth stating that on August 3, 1979, at 2:55 P.M., at 30 Rockefeller Center, he personally served Hormoz Sabet, who is described in the affidavit as a male with black hair, approximately 42 years of age, 5'11", 160 pounds.

Since this conflict may be due to Hormoz Sabet's failure to recall service in this action, the Court directs that Hormoz Sabet submit a further sworn affidavit expressly addressing the allegations set forth in the affidavit of Carl Kornbluth. If no such affidavit is submitted within 15 days of the date of this Opinion and Order, the Court will direct the entry of summary judgment against Hormoz Sabet. If such an affidavit is submitted contradicting the process-server's affidavit, the case will be referred to a magistrate for a hearing on this issue.

3. Firooz Corporation

For the reasons stated in this Court's Opinion and Order in Republic, supra, it does not appear that service on the agent designated in the Firooz guarantee may be sufficient to reach the new management of Firooz. Firooz has not,

in fact appeared. Accordingly, plaintiff shall serve Firooz in accordance with the procedures outlined by Judge Duffy in the consolidated Iranian cases in this District, see New England Merchants National Bank v. Iran Power Generation and Transmission Co., and following cases, No. 79 Civ. 6380 et al. (S.D.N.Y. 1980).

If no answering papers or other response from Firooz are received within 60 days of the date of service by the method outlined in Judge Duffy's Opinion, a default judgment will be entered against defendant Firooz.

Summary

Plaintiff's motion for summary judgment is granted as to defendants Habib and Iradj Sabet.

Plaintiff's motion for summary judgment will be granted as to defendant Hormoz Sabet unless within 15 days of the date of this Opinion and Order Hormoz

Sabet submits an affidavit as indicated above.

As plaintiff has amply shown probability of success on the merits, plaintiff shall submit an order confirming the order of attachment and providing for entry of partial summary judgment pursuant to Rule 54(b), F.R.Civ.P., in accordance with this Opinion and Order.

As to the remaining cause of action against Firooz Corporation, the case will be placed on the Suspense docket pending service on Firooz by the method suggested above.

SO ORDERED.

s/ William D. Conner
United States District Judge

Dated: New York, New York
August 29, 1980

FOOTNOTES

1. As discussed below, Firooz has not appeared in this action.

2. Section 9-504(3) provides:

"Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale."

3. Section 9-505(2) provides:

> "...a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification or if any other secured party objects in writing within thirty days after the secured party obtains possession the secured party must dispose of the collateral under Section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation."

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CLERK

No. 82-31

IN THE

Supreme Court of the United States

October Term, 1982

HORMOZ SABET,

Petitioner,

— against —

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: August 3, 1982

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IN THE

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October Term, 1982

No. 82-31

HORMOZ SABET,

Petitioner,

- *v.* -

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent American Express International Banking Corporation ("AEIBC") submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit of petitioner Hormoz Sabet.

STATEMENT OF THE CASE

Proceedings in the District Court

This action was brought by AEIBC in July of 1979 for amounts due on three promissory notes dated September 26, 1977, December 9, 1977 and January 28, 1978 (the "Notes"), which were executed by Habib Sabet, Iradj Sabet and the petitioner, Hormoz Sabet.[1] The Notes were issued under and entitled to the benefits of a loan agreement dated December 9, 1977 (the "Loan Agreement") which was also executed by each of the Sabets.

In connection with the loans, Hormoz and Iradj Sabet also executed individual unconditional guaranties of all obligations of

1. The action was commenced in the New York State Supreme Court by motion for summary judgment in lieu of complaint on the Notes and Guaranties, and was subsequently removed by the Sabets to the United States District Court for the Southern District of New York.

Habib Sabet to AEIBC (the "Guaranties"). As further security for the three loans, Firooz Corporation ("Firooz") and Iramoz Corporation ("Iramoz"), two companies in which the Sabets had business and financial interests, pledged to AEIBC 150,000 shares of the capital stock of the Industrial Mining and Development Bank of Iran (the "Pledged Shares").[2]

It has never been disputed that the Sabets were the primary obligors on the Notes, or that the Pledged Shares were owned by Firooz and Iramoz, who were not parties to the Notes. Nor has it been disputed that the loan documents upon which this action is brought are authentic, that the loans have been in default since at least January 3, 1979, that upon default AEIBC had the right to, and did, accelerate the Notes and call upon the Guaranties, or that the aggregate sum of $3,880,574.24 was due and owing as of November 5, 1980, and that interest continues to accrue thereon.

At the outset of this action petitioner alleged that he had not been served with process; nevertheless, he took the leading role in the Sabets' defense to AEIBC's action. On two occasions he submitted affidavits setting forth various defenses and counterclaims, including the collateral-related defenses under the New York Uniform Commercial Code which he now brings before this Court. In an Opinion and Order dated August 29, 1980, Judge Conner rejected these and all other alleged defenses to liability and granted AEIBC summary judgment against petitioner's co-defendants Habib and Iradj Sabet. *American Express International Banking Corporation v. Sabet*, 512 F. Supp. 463 (S.D.N.Y. 1980).[3]

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2. Firooz also executed an unconditional corporate guaranty of the Sabets' obligations.

3. Habib and Iradj Sabet subsequently appealed the judgment against them to the United States Court of Appeals for the Second Circuit, raising, *inter alia*, the same commercial law issues petitioner now brings before this Court. The Second Circuit summarily affirmed. For the convenience of this Court, the Second Circuit's opinion, which was not reported, is set forth in Appendix A, *infra* at A-1, *et seq.*

Apparently concerned that, notwithstanding his defense on the merits and the affidavit of a professional process server submitted by AEIBC, petitioner might have "failed to recall service in this action", Judge Conner granted summary judgment against petitioner unless he submitted an affidavit specifically denying service (P. B-56, 512 F. Supp. at 471).[4] Upon petitioner's submission of such an affidavit the matter was referred by Judge Conner to United States Magistrate Ruth Washington for a hearing.

Proceedings Relating to Service of Process

Magistrate Washington heard evidence at two hearings conducted on October 8 and October 31, 1980 on the question of whether AEIBC had effected service of process on petitioner. Among others, the Magistrate heard the testimony of the professional process server, the petitioner and petitioner's attorney, Mark Lebow ("Lebow").

At the commencement of the hearings Magistrate Washington asked counsel whether they wanted a stenographic transcript of the proceedings made. Counsel for both parties declined the opportunity to have such a transcript made. Magistrate Washington then informed the parties that she would be tape recording the hearings for her own use (P. B-2).

On February 10, 1981, the Magistrate issued her Report and Recommendation in which she concluded that Sabet had been personally served by AEIBC (P. B-5). The Magistrate noted that the question of personal service amounted to a credibility determination between the conflicting testimony of the process server and petitioner. Her considered opinion was that petitioner's testimony was incredible. The Report stated that the

4. The District Court's opinions, its Statement on Remand from the Court of Appeals, the Report and Recommmendation of the United States Magistrate and the opinions of the Court of Appeals are set forth in Appendices A and B to the Petition. References herein to "(P. A-__)" and "(P. B-__)" are to such appendices.

process server's "oral testimony in general was credible and, combined with his affidavit of service substantiates plaintiff's position of having personally served defendant Hormoz Sabet . . . despite Mr. Sabet's . . . testimony" (P. B-9).

Petitioner subsequently filed an objection to the Magistrate's finding that he had been personally served and requested that Judge Conner conduct a *de novo* review of the issue or, alternatively, rehear the evidence himself. Although the substance of his objections was that the Magistrate's decision misconstrued testimony and generally did not comport with the weight of the evidence adduced, petitioner at no time advised Judge Conner that a taped record of the proceedings existed or requested that he review the tape. Rather, on February 25, 1981, petitioner submitted to the District Court his own affidavit and the affidavit of Lebow, together with a letter of counsel which stated that the affidavits *"set forth the substance of what was testified to with respect to the issue of personal service"* (B-1).[5] In the letter petitioner's counsel suggested that the District Court use the affidavits as the basis for its *de novo* determination *"in the event the Court does not wish to take oral testimony"* (B-2).

In an Opinion and Order dated April 6, 1981, Judge Conner fully adopted the Magistrate's proposed finding that petitioner had been personally served (P. B-17).[6] Judge Conner concluded that:

> [the Magistrate's] proposed finding that [the process server's] testimony, as bolstered by his contemporaneous records, was more worthy of belief than the testimony of Sabet, an obviously interested party, whose version of events was only partially supported by the testimony of [Lebow], appears wholly reliable.

(P. B-24, 512 F. Supp. at 474).

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5. The text of the transmittal letter accompanying petitioner's affidavits is set forth as Appendix B, *infra*, at B-1, *et seq.*

6. *American Express International Banking Corporation v.Sabet*, 512 F. Supp. 472 (S.D.N.Y. 1981).

This conclusion was based in large part on the fact that the Magistrate had given credence to the process server's testimony "after having an opportunity to observe [his] demeanor under direct and cross-examination" (P. B-22, *id.*).

Moreover, the opinion makes clear that in making his *de novo* determination of the service issue, Judge Conner gave full consideration to the affidavits submitted by petitioner. The court determined, however, that the affidavits did not "alter the reliability of the Magistrate's proposed findings." (P. B-24, *id.*) In particular, it pointed out that petitioner's statements were self-serving and that Lebow's statements were not inconsistent with the process server's more credible version of the events (P. B-24-25, *id.*)

Having found that petitioner had been personally served, on April 15, 1981, the District Court entered a judgment against him, which petitioner appealed to the United States Court of Appeals for the Second Circuit.

Proceedings Before the Court of Appeals

In his brief to the Court of Appeals, petitioner alleged for the first time that the review he had sought and received from the District Court was inadequate. Contradicting his express representations to Judge Conner, he now argued that the District Court was required to either review a transcript of the proceedings (which petitioner had waived) or hear the evidence anew. Conspicuously absent from petitioner's brief was any explanation for his failure to have requested that Judge Conner review the Magistrate's tape or even to have called it to his attention. In addition, petitioner raised yet again the commercial law defenses which had been previously rejected by the Second Circuit on the appeal of his co-defendants, and which he now brings before this Court.

Oral argument was scheduled and counsel for the parties came on to be heard. The Court of Appeals, however, having determined that the record before it was unclear as to the scope of Judge Conner's review, limited counsels' oral argument and by its

order dated December 11, 1981, remanded the action to Judge Conner for a statement as to whether he had listened to Magistrate Washington's tape recording of the proceedings (P. A-5).

On December 23, 1981 Judge Conner issued his Statement on Remand (P. B-1). Although Judge Conner acknowledged in his statement that he had not listened to Magistrate Washington's recording, he also set forth the scope of his review on the service issue and the reasons therefor. He pointed out that both parties had declined to have a transcript made of the proceedings, and that the Magistrate had made the tape recording for her own use. He further stated that Magistrate Washington's customary practice is to preserve recordings of proceedings from 10 to 20 days after issuing her recommended decision in order to allow parties sufficient time to file objections pursuant to 28 U.S.C. § 636(b)(1). As Judge Conner explained, "Because the objections filed by defendant-appellant did not contain a request that the Court listen to the tape recording or that the tape recording be made part of the record, [Magistrate Washington] feels sure that, in accordance with her customary practice, she erased the tape not later than about 20 days after February 10, 1981 (and before I began review of the relevant materials in preparation for my decision of April 6, 1981)" (P. B-3). Finally, Judge Conner confirmed that petitioner had never suggested that he listen to the tape recording, but instead requested that he make a *de novo* determination *either* after a second evidentiary hearing *or* on the basis of the affidavits submitted by petitioner and Lebow and that, in accordance with this request, his *de novo* determination was based upon the affidavits.

The Court of Appeals summarily affirmed Judge Conner's decision on April 5, 1982 (Moore, C.J., Timbers, Van Graafeiland) (P. A-1), and petitioner subsequently moved to vacate the judgment and reschedule argument before the Second Circuit. That motion was denied on May 20, 1982. Petitioner now asks this Court to grant its request for further review.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The District Court's *de novo* determination, based on a review of the Magistrate's findings and petitioner's affidavits, was proper where the record demonstrates that petitioner did not seek and in fact made impossible any review of a "complete record."

Petitioner seeks review of the question of whether, where a party has objected to the findings of a Magistrate, 28 U.S.C. § 636(b)(1) of the Federal Magistrates Act requires a district court, "in the absence of *any record*, to rehear the testimony." Petition at (i) (emphasis added). This question is academic, for it is simply not presented by the facts of this case. Indeed, the record demonstrates that petitioner's argument is entirely contrived: it was petitioner who purposefully dispensed with a transcript of the proceedings, petitioner who preferred to provide the Court with his own affidavits summarizing the proceedings, and petitioner who sought *and received* a *de novo* review based upon his affidavits—the very procedure he now argues is inadequate. Under these circumstances petitioner's manufactured issue does not merit review by this Court.

Petitioner's course of conduct makes clear that his strategy at every stage of the proceedings relating to the service issue was to deny the District Court, or any other court, the opportunity to review a "complete record" of the hearings before the Magistrate. As Judge Conner has pointed out in his Statement on Remand, at the very commencement of the hearings petitioner's counsel expressly waived the opportunity to have a stenographic transcript made. Furthermore, even though petitioner knew that Magistrate Washington had made a tape recording of the proceedings for her own use, petitioner's counsel failed to refer the District Court to this tape or even to mention it when he sought review of the Magistrate's findings on February 20, 1981. Precisely because petitioner's objections did not refer to the recording, Magistrate Washington erased the tape 10 or 20 days after

she issued her recommendation. Thus the only record of the proceedings in which the Magistrate had found petitioner's testimony incredible was lost.

Petitioner argues that in the absence of any "complete record" (by which he presumably means a transcript or tape recording), the District Court was required to rehear the testimony presented before the Magistrate. However, that position directly conflicts with the scope of review he sought from the District Court. After petitioner had objected to the Magistrate's findings, he submitted to the District Court his own five-page affidavit and a three-page affidavit of counsel. According to the letter accompanying these affidavits, the affidavits "set forth the substance of what was testified to with respect to the issue of personal service" and were submitted in order to provide the District Court with a basis for its review "in the event the Court does not wish to hear further oral testimony" (B-1,2). As Judge Conner's Statement on Remand makes clear, the District Court adopted petitioner's suggestion and based its review on the affidavits, which presented petitioner's case in its most favorable light (P. B-4). It was only after Judge Conner had found "wholly reliable" the Magistrate's findings that petitioner argued that a determination on the basis of the affidavits was improper. *American Express International Banking Corporation v. Sabet*, 512 F. Supp. 472, 474 (S.D.N.Y. 1981).

Under these circumstances, Judge Conner's review was entirely consistent with the requirements of the Magistrates Act. In *United States v. Raddatz*, 447 U.S. 667, 674, *reh'g denied*, 448 U.S. 916 (1980) this Court expressly stated that there is no requirement that a district court rehear the testimony presented to a magistrate in order to make a proper *de novo* determination under 28 U.S.C. § 636(b)(1). Moreover, the Fifth Circuit has ruled that a trial judge need not have a complete transcript of the proceedings for a proper *de novo* review if "the parties stipulate otherwise." *United States v. Lewis*, 621 F.2d 1382, 1387 (1980), *cert. denied*, 450 U.S. 916 (1981). Here, petitioner effectively waived a review of a complete record by declining his

right to a transcript, proferring to the District Court his own version of the testimony and suggesting that the court's review be based on his submissions.

The suggestion in the Petition that the District Court relied solely on the Magistrate's Report in making its review is contradicted by the record. The opinion of April 6, 1981 demonstrates that the court's decision was hardly a "rubber-stamp" approval of the Magistrate's findings. In accordance with petitioner's request, Judge Conner clearly gave careful consideration to each of petitioner's affidavits and correctly found that much of the testimony contained therein was not inconsistent with the process server's version of events (P. B-22-25). As to the credibility of petitioner's denial of service, the Court ultimately chose to adopt the finding of the Magistrate, who had the benefit of observing the demeanor of the witnesses. In so doing, Judge Conner was simply applying the principle set forth in *Raddatz* that a district judge may place "whatever reliance . . . in the exercise of sound judicial discretion" he chooses on a Magistrate's proposed findings and recommendations. 447 U.S. at 676.[7]

The Court of Appeals could not have done otherwise than to affirm the adequacy of Judge Conner's review. To require, as petitioner urges, that the District Court conduct a second hearing under the circumstances of this case would completely defeat the objective of the Magistrates Act, which is to alleviate the congestion of litigation in the district courts. *See United States v. Raddatz, supra*, 477 U.S. at 676 n.3. Moreover, such a rule would provide unscrupulous parties with a blueprint for abuse of the judicial process. Any party could *guarantee* itself an entirely new hearing on demand by simply following petitioner's course of action and not requesting that a transcript be made of the proceedings before the Magistrate. Finally, fundamental concepts

7. Where the issue is primarily one of credibility, as it is here, this Court has indicated that it is particularly appropriate for the district judge to rely on the Magistrate's findings: "To construe § 636(b)(1)(C) to require the district court to conduct a second hearing whenever either party objected to the magistrate's credibility findings would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts." *Id.* at n.3.

of judicial fairness prohibit overturning the District Court's findings where, as here, petitoner's counsel actually suggested the standard of review which he now argues resulted in error. *See State v. Tudor*, 154 Ohio St. 249, 95 N.E.2d 385 (1950).

2. Petitioner's claim that United States courts lack jurisdiction over AEIBC's claim against him is based on an unsupportable misreading of the Iran-United States Hostage Agreements.

Petitioner also argues that the Iran-United States Hostage Agreements divested the federal courts of jurisdiction over AEIBC's claim against him. This exact claim has already been presented by petitioner and rejected by this Court in *Republic National Bank v. Sabet*, No. 79 Civ. 4290 slip op. (2d Cir. March 27, 1981), *cert. denied*, 50 U.S.L.W. 3916 (U.S. May 18, 1982) (No. 81-1767). Petitioner's recapitulation of the argument here presents no grounds for this Court to reconsider its earlier decision.

The sole purported authority for petitioner's argument is the following provision of the Hostage Agreements (emphasis added):

> An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding *claims of nationals of the United States against Iran and claims of nationals of Iran against the United States*, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or banking guarantees), expropriations or other measures affecting property rights . . . .[8]

8. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981 (the "Hostage Agreements"), Article II(1).

Petitioner urges this Court to rule that this provision establishes the Iran-United States Claims Tribunal as the exclusive forum for the resolution of AEIBC's claims against him and that it ousts the federal courts of jurisdiction over this action.

The argument is simply nonsense. The provision plainly confers *no jurisdiction at all* on the Claims Tribunal over AEIBC's claim against petitioner. The Tribunal is granted jurisdiction over (a) claims of United States nationals against *Iran*, and (b) claims of Iranian nationals against the *United States*. But this case involves only a claim by a United States national, AEIBC, against an Iranian national, Hormoz Sabet. A claim by a national of the United States against a *national* of Iran clearly does not fall within the jurisdiction of the Claims Tribunal.

Indeed, it could hardly be otherwise. The very purpose of the Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981 (the "Algerian Declaration") is the termination of "all litigation as between the *Government* of each party and the nationals of the other . . . ." Algerian Declaration, General Principles (B) (emphasis added). The United States agreed "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against *Iran and its state enterprises*. . . ." *Id.* (emphasis added). Obviously, Hormoz Sabet is neither "Iran" nor "its state enterprises."[9]

The explanation which accompanied the Hostage Agreements upon their transmittal to Congress by the Department of State reveals that the State Department has a similar understanding of the jurisdiction accorded the Claims Tribunal:

> The claims settlement agreement establishes the Iran-U.S. Claims Tribunal for the purpose of deciding (1) claims of U.S. nationals against Iran, (2) claims of Iranian nationals against the United States, and (3) certain claims of the United States and Iran against each other.

United States Department of State, Selected Documents No. 19, "Hostage Agreements Transmitted to Congress," March 12, 1981, at 2. There is not a shred of support in the Hostage

9. Hormoz Sabet, as an Iranian national, cannot be considered "Iran" even under the expansive definition accorded that term in Article VII(3) of the Hostage Agreements.

Agreements, or the Executive Orders promulgated thereunder, that those agreements, and the claims settlement machinery which they establish, encompass a claim by a United States *national* against an Iranian *national*. *See also* United States-Iran Agreement on Release of the American Hostages, Message to Congress, January 19, 1981, Administration of Jimmy Carter 3041 ("There will be established an international tribunal to adjudicate various disputed claims by U.S. nationals against Iran. . . .").

Nor does anything in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) suggest a different result. *Dames & Moore* assumed without discussion that the Hostage Agreements apply only to claims by United States institutions against Iran and its state enterprises. *Id.* at 660, 665, 675. It also held that the Hostage Agreements did not detract from the jurisdiction of the lower federal courts. Indeed, *Dames & Moore* expressly recognized that claims not explicitly relegated to the Tribunal would be tried in United States courts:

> [W]e do not believe that the President has attempted to divest the federal courts of jurisdiction. . . . As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts.

Id. at 684. The federal courts are not divested of jurisdiction over claims which cannot be presented to the Claims Tribunal.

In fact, the Tribunal has already ruled (by a 6 to 3 vote) that despite Iran's contention to the contrary, the Claims Tribunal has no jurisdiction over claims of Iran against nationals of the United States. *Case A/2*, rendered December 21, 1981, *reprinted in Iranian Assets Litigation Reporter* 4,278-83 (February 19, 1982). The Tribunal said:

> It can easily be seen that the parties set up very carefully a list of the claims . . . which could be submitted to the arbitral tribunal . . . They knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.

Id. at 4,279. *A fortiori*, if Iran cannot take its claim against a national of the United States before the Claims Tribunal, then a national of the United States cannot pursue there its claim against a national of Iran.

3. The commercial law issues raised by petitioner are without merit.

Petitioner's final question presented for review takes issue with the District Court's reading of a technical question of New York commercial law which accords in every respect with the applicable provisions of the Uniform Commercial Code, principles of common law and the decisions of every court which has considered the matter. *Such an issue is plainly not appropriate for presentation to the Supreme Court of the United States, and the Petition contains no suggestion whatsoever why this Court should accept it for review.*

Petitioner argues that he should be discharged from his undisputed liability on the Notes by AEIBC's alleged satisfaction of the obligations by resort to the Pledged Shares owned by Firooz and Iramoz and/or by AEIBC's alleged impairment of the collateral. The District Court determined that these defenses were not available to any of the co-makers of the Notes, including petitioner, because as primary obligors with no right of recourse against the collateral they were not sureties and thus lacked standing to assert collateral-related defenses (P.B-49-53, 512 F. Supp. at 469, 471). Petitioner appealed Judge Conner's finding to the United States Court of Appeals for the Second Circuit, where it was summarily affirmed (P. A-1).[10]

10. The issue had previously been presented to the Second Circuit by petitioner's co-defendants in their appeal of the District Court's decision. In its Summary Affirmance dated May 4, 1981, the Second Circuit agreed with the District Court:

> Judge Conner determined, and we believe correctly, that those provisions [of the Code asserted by defendants] do not cover a non-owner obligor whose obligation is independent of the pledgor's and who has no right of recourse against the collateral whatsoever. (A-3).

The District Court's holding is an accurate statement of New York law. The Notes are commercial instruments and as such the discharge of parties thereto is governed exclusively by the provisions of Article 3 of the New York Uniform Commercial Code ("Code"). Code § 3-601. Discharge by payment or satisfaction is governed by Code § 3-603, which states that *only* the party who actually pays or satisfies the holder is entitled to discharge from his liability on a note.[11] Thus as a co-maker of the Notes, petitioner remains unconditionally liable to the holder of the Notes until such time as he makes payment.

The result under common law is to the same effect. As non-party pledgors of collateral to secure the obligations of the Sabets, Firooz and Iramoz are sureties. *Cross v. Allen*, 141 U.S. 528, 534 (1891); Restatement of Security § 36(1). It is elementary that at common law payment or satisfaction by a surety does not discharge the maker's obligation to the holder of the note.[12] *Assets Realization Co. v. Mercantile National Bank*, 167 A.D. 757, 153 N.Y.S. 156 (1st Dept. 1915) ("payment of a note in whole or in part by one secondarily liable thereon does not discharge the liability of the maker."); *Madison Square Bank v. Pierce*, 137 N.Y. 444, 33 N.E. 557 (1893).

Similarly, under the Code the defense of discharge of a party to an instrument by reason of impairment of collateral pledged by another is available only if such party has a right of recourse

11. Code Section 3-603 states in relevant part:

> The liability of any party is discharged to the extent of *his* payment or satisfaction to the holder .... (emphasis supplied)

Paragraph 5 of the Official Comment to § 3-603 makes clear that payment by a third party does not discharge obligors who have no right of recourse against the payor.

12. Indeed, this principle is manifest in the very provision of New York General Obligations Law ("G.O.L.") cited by petitioner at page 23 of his Petition. G.O.L. § 15-103 expressly excepts from the requirement that payment by one co-obligor be credited to the obligation of another any payment by one who stands in the relation of a surety to the other obligors.

against the pledgor. Code § 3-606(1)(b).[13] Every court which has considered the question has held that the defense of impairment is not available to primary obligors who have no interest in or recourse against the collateral. *E.g., Commerce National Bank v. Baron*, 336 F. Supp. 1125 (E.D. Pa. 1971); *Oregon Bank v. Baardson*, 256 Or. 454, 473 P.2d 1015 (1970); *Wohlhuter v. St. Charles Lumber Co.*, 62 Ill. 2d 16, 338 N.E.2d 179 (1975). Although New York courts have not yet considered this issue, their decisions interpreting § 3-606 are consistent with the District Court's holding in this action. *See Mikanis Trading Corp. v. Block*, 59 A.D. 2d 689, 398 N.Y.S.2d 679 (1st Dept. 1977); *Beneficial Finance Co. v. Husner*, 82 Misc. 2d 550, 369 N.Y.S.2d 975 (Sup. Ct. Wayne Co. 1975).[14]

Petitioner does not dispute that he neither owns nor has any right of recourse against the collateral pledged to secure the Notes which are the subject of this action. Accordingly, petitioner's arguments are without merit and present no issues worthy of consideration by this Court.

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13. Section 3-606(1)(b) provides that:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> • • •
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

Official Comment 1 to § 3-606 explicitly states that:

> The suretyship defenses here provided . . . are available to *any party who is in the position of a surety, having a right of recourse* either on the instrument or dehors it, including an accommodation maker or acceptor known by the holder to be so.

14. Petitioner cites *Indianapolis Morris Plan v. Karlen*, 28 N.Y.2d 30, 319 N.Y.S. 2d 831 (1971) in support of his claim that AEIBC's alleged impairment of collateral entitles him to discharge. As the Second Circuit confirmed in its summary affirmance of AEIBC's judgment against petitioner's co-defendants:

> The language [in *Karlen*] relied upon by defendants is dictum and, in any event, *does not* support their contention that a non-owner obligor is discharged upon the impairment of collateral against which he has no right of recourse. (A-3).

CONCLUSION

For the foregoing reasons, the Petition of Hormoz Sabet for a Writ of Certiorari should be denied.

Dated: New York, New York
August 3, 1982

Respectfully submitted,

JOHN F. PRITCHARD
Attorney for Respondent
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Banking Corporation
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ROBERTS
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(212) 943-0700

Of Counsel:

DAVID J. LONG
ROY L. SMART

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the Fourth day of May, one thousand nine hundred and eighty-one.

Present: HONORABLE LEONARD P. MOORE,
HONORABLE THOMAS J. MESKILL, *Circuit Judges*,
HONORABLE LLOYD F. MAC MAHON, *District Judge*.

Docket No. 80-9110

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Plaintiff Appellee,

v.

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants,

HABIB SABET and IRADJ SABET,

Defendants-Appellants.

Appeal from a decision of the United States District Court for the Southern District of New York, Conner, J., granting the plaintiff summary judgment and confirming an order of attachment.

This cause came on to be heard on the transcript of record from the district court and was argued by counsel.

This action was instituted by the plaintiff to recover amounts allegedly due and owing on three loans made to the defendant Habib Sabet between 1977 and 1978. Co-defendants Iradj Sabet and Hormoz Sabet cosigned the notes tendered by Habib and additionally executed separate unconditional guarantees. The loans were also secured by corporate guarantees and collateral pledged by two corporations, Firooz and Iramoz, which were controlled by the Sabets until their expropriation by the Islamic Provisionary Revolutionary Government of Iran in 1979.

This diversity action was commenced in the Supreme Court of the State of New York, County of New York. An order of attachment was obtained on July 30, 1979 and while this action was still pending in state court, the plaintiff moved for summary judgment in lieu of complaint pursuant to N. Y. Civ. Prac. § 3213 (McKinney 1970). This action was removed to the district court pursuant to 28 U.S.C. § 1441 (1976) in August 1979. The district court granted the plaintiff's motion for summary judgment against Habib Sabet and Iradj Sabet and confirmed the order of attachment. Unresolved jurisdictional issues prevented the district court from entering judgment against the other two named defendants, Hormoz Sabet and Firooz Corporation.

The defendants assert on appeal the same defenses rejected by the district court below. First, the defendants contend that plaintiff unjustifiably impaired the collateral pledged by Firooz and that this conduct resulted in the defendants' discharge from their obligations on the loans pursuant to N. Y. U.C.C. § 3-606(1)(b) (McKinney 1964). Second, the defendants assert counterclaims under the pledge agreements and N. Y. U.C.C. §§ 9-504, 9-505, and 9-507 (McKinney 1964) which relate to the plaintiff's treatment of the collateral pledged by Firooz. And finally, the defendants make the alternative argument that Firooz was actually the real obligor on the notes, that they were merely accommodation parties to Firooz, and therefore, that the plaintiff's disposition of the collateral pledged by Firooz discharged them.

Judge Conner ruled below that the defendants were not accommodation parties but primary obligors and lacked standing to assert the defenses contained in §§ 3-606(1)(b), 9-207, and 9-507 of the Uniform Commercial Code. The district court determined that neither Habib or Iradj Sabet possessed any interest in the collateral that was pledged by Firooz and would have no right of recourse against the pledged stock. Judge Conner determined that the defenses contained in § 3-606(1)(b) are only available to parties who actually pledge collateral themselves or are in the position of a surety, having a right of recourse against the collateral that is alleged to have been impaired. Since the defendants

fell into neither of these categories their claim under that provision was rejected. We are satisfied that Judge Conner's decision in this regard was correct. The language contained in the New York Court of Appeals' decision in *Indianapolis Morris Plan v. Karlen*, 28 N.Y.2d 30, 34 (1971) (Breitel, J.), relied upon by the defendants is dictum and, in any event, *does not* support their contention that a non-owner obligor is discharged upon the impairment of collateral against which he has no right of recourse. The defendants' claims asserted under §§ 9-504, 9-505, and 9-507 of the Uniform Commercial Code were rejected on the ground that the rights under those provisions were available only to Firooz, the owner of the collateral. The district court acknowledged that under some circumstances a non-owner obligor has been permitted to assert rights under those provisions; however, Judge Conner determined, and we believe correctly, that those provisions do not cover a non-owner obligor whose obligation is independent of the pledgor's and who has no right of recourse against the pledged collateral whatsoever.

The remainder of the arguments advanced by the defendants are equally without merit and therefore we affirm the decision of the district court.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons contained in Judge Conner's opinion below.

/s/ LEONARD P. MOORE
Leonard P. Moore, U.S.C.J.

/s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

/s/ LLOYD F. MACMAHON
Lloyd F. MacMahon, U.S.D.J.*

* Honorable Lloyd F. MacMahon, Chief Judge of the United States District Court for the Southern District of New York, sitting by designation.

B-1

[Letterhead of Coudert Brothers]

February 26, 1981

BY HAND

Honorable William C. Conner
United States District Judge
Room 129, United States Courthouse
Foley Square
New York, New York 10007

Re: American Express International Banking Corporation v. Habib Sabet, et al.

Dear Judge Conner:

On September 22, 1980, you referred the above-captioned action to Magistrate Ruth Washington for a hearing as to whether or not plaintiff had effected valid personal service upon defendant Hormoz Sabet. Thereafter, plaintiff requested, and you agreed to have the Magistrate also decide, whether valid substituted service had been effected. On February 10, 1981, Magistrate Washington issued her Report and Recommendation, finding that plaintiff had effected valid personal service, but had not effected valid substituted service upon defendant.

On February 20, 1981, defendant filed an affidavit of counsel setting forth his objection to the Magistrate's finding of valid personal service. As described therein, the Magistrate has misconstrued the testimony of defendant and his attorney, both of whom testified at the hearing. In that affidavit, defendant requested "a de novo determination" of the issue, as provided for in Title 28, United States Code Section 636(b)(1) and, in the alternative, requested that the Court hear the pertinent evidence itself, which it is estimated would require no more than ninety minutes. In the event the Court does not wish to hear further oral testimony, we submit herewith two brief affidavits which set forth the substance of what was testified to with respect to the

issue of personal service. These affidavits demonstrate conclusively that defendant was not and could not have been served personally on the afternoon of August 3, 1979, because he was never at the location at which service was alleged to have been made at *any* time that afternoon.

We remain prepared to present this brief testimony to the Court on the shortest of notice, but submit these affidavits in order to expedite this matter in the event the Court does not wish to take oral testimony. We believe the Magistrate's order to rest on a simple misunderstanding of the testimony presented, and urgently request the opportunity to clarify this matter. It is particularly important that defendant be afforded this opportunity, since your Honor has indicated your intention to grant summary judgment against him, thereby depriving him of any further opportunity to contest this or any other issue in the case.

Yours very truly,

/S/ JERRY L. SIEGEL
Jerry L. Siegel

JLS:gdd
Enclosure

cc: Winthrop, Stimson, Putnam & Roberts

INFORMATION CONCERNING AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION REQUIRED BY RULE 28.1 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

I. Parent company:

American Express Company

II. Significant subsidiaries (other than wholly owned subsidiaries):

Egyptian American Bank (Egypt)

The Bancom Group, Inc. (Philippines)

The Pacific Bank Berhad (Malaysia)

III. Significant affiliates (joint ventures):

Ultramex S.A.—Arrendamento Mercantile (Brazil)

Arrendadora Comercial—Amex, S.A. de C.V. (Mexico)

AMP— Amex Leasing Limited (New South Wales)